

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.1662 of 1996

Smt.Sundarabai Govardhandas Samsuka
since deceased through her
legal representative:

1A Mrs Shantabai Dhansukhlal Jain

(Binaykiya) deceased through L.Rs

1AA Shri Dhansukhlal Kattachardas Jain

1AB Shri Sandeep D. Jain

1AC Smt. Premela Satis Karnavat,

1AD Smt. Ujvala Kundanmal Darda

1AE Smt.Mangala Nadkumar Nahar

1AF Smt.Shaila Dinesh Pungaliya

1AG Smt.Anita Amrutlal Pipade

1AH Smt.Sunita Vijaykumar Picha

1AI Smt.Archana @ Suchita Sunilkumar Tatiya

1AJ Dr.(Smt) Bharti Satish Kankriya

1B Mrs. Rupabai Pruthviraj Lalwani

1C Mrs.Lilabai Ramanlal Darda(Sugandhi)

1D Mrs.Ashabai @ Shibanibai Sampatilal

Punglia

..Appellants

V/s

1. Mr.Ratanlal @ Babulal Chunilal Samsuka

2. Mr.Nemichand @ Bajulal Chunilal Samsuka]

3. Mr.Ashok @ Bhagchand Chunilal Samsuka

4. Mr.Kantilal Chunilal Samsuka

5.M/s Govardhandas Lakmichand

And Co.

...Respondents

Shri Mohan Pungaliya for Appellants

Smt.Anita A. Agarwal for Respodnent no.1

CORAM:S.B.MHASE &

S.R.SATHE, JJ.

DATED: 22nd Dec. 2006

ORAL JUDGMENT :- (Per S.R.Sathe, J.)

1. Appellants the original plaintiffs in Special Civil Suit No.395 of 1987 have preferred this Appeal against the judgment and order passed by the Court of 3rd Joint Civil Judge, Senior Division, Nasik whereby plaintiffs' suit was partly decreed in their favour and it was declared that the deceased Sundarabai, original plaintiff had 1/5th share in the assets and liabilities of the partnership firm i.e. defendant no.5 and Preliminary decree for taking accounts was passed but the declaration claimed by the plaintiffs that defendant no.1 Ratanlal is not the adopted son of late Govardhandas and original plaintiff Sundarabai was not granted in favour of the plaintiffs and it was held that the plaintiffs have failed to prove that the defendant no.1 is not adopted

son of deceased Govardhandas.

2. For the sake of convenience hereinafter the parties shall be referred to as the plaintiffs and defendants.

. Brief facts giving rise to this appeal are as under:

3. Govardhandas Lakhmichand and Chunilal Lakhmichand were real brothers. Original plaintiff Sundarabai is the wife of Govardhandas. The defendant no.1 is the son of Chunilal. Original defendant nos. 6 to 9 are daughters of late Govardhandas. He died some time in the year 1982 leaving behind wife Sundarabai and 4 daughters.

4. Late Govardhandas was carrying on business of Timber in the name of defendant no.5 and initially it was his sole proprietary concern. The defendant no.1 since his childhood had gone to Nasik for taking education and was residing with his uncle late Govardhandas. Subsequently, original defendants nos.1 to 4 were taken as partners by Govardhandas in his business.

5. After the death of Govardhandas his wife Sundarabai i.e. original plaintiff was taken as a partner in the said firm. In the year 1986-87 finding that defendant nos.1 to 4 were not giving any share in the profits of the partnership firm to her, Sundarabai called upon them to give accounts of the partnership firm and also pay

amount of her share.

6. In the year 1984 or thereabout Dhondabai Chunilal Shamsuka (wife of Chunilal), Nemichand Chunilal, Bhagchand Chunilal, Kantilal Chunilal issued notice to original plaintiff Sundarabai and her daughters and Ratanlal wherein it was alleged that Ratanlal was given in adoption to Sundarabai on 8-7-1973. They also did not consider Ratanlal as heir of Chunilal and claimed partition of the joint family property of Govardhandas and Chunilal. Original plaintiff no.1 Sundarabai and her daughters issued reply to the said notice dated 1-10-1984 and categorically denied that Ratanlal was given in adoption to Govardhandas. On 1-10-1987 Sundarabai filed Special Civil Suit No.397 of 1987 for dissolution and accounts of defendants.5 partnership firm and also claimed declaration that defendant no.1 Ratanlal is not the adopted son of Govardhandas and he should not pose himself accordingly.

7. The defendant nos.1 to 5 filed their joint written statement at Exh.43 and denied all the allegations in the plaint and contended that there was no reason for the plaintiffs to file the said suit and it was filed just to harass the defendants. The defendants therefore prayed for dismissal of the suit.

8. On the above mentioned pleadings the learned trial

Judge framed issues at Exh.47. During the pendency of the suit original plaintiff Sundarabai died and her heirs viz. 4 daughters who were initially defendants nos. 6 to 9 were brought on record as plaintiffs.

9. In order to prove the suit claim on behalf of the plaintiffs they examined Dhansukhlal Jain, son-in-law of Sundarabai at Exh.68, witness Vilas Kachrekar, an employee from Telephone Department Exh.90 and witness Veljibhai Patel Exh.197. As against this the defendant no.1 examined himself at Exh.121 and witness Chaturbhuj Sharma, alleged priest who performed adoption ceremony Exh.152, Girjapa Kotule Exh.153, Mohanlal Chunilal Bhandari Exh.154 and witness Ajit Sarang, photographer Exh.155. Both the parties produced certain documents. The defendant no.1 also produced some photographs alleged to have been taken at the time of adoption ceremony. After considering the evidence adduced by both the parties and hearing arguments of both the learned advocates the learned trial Judge came to the conclusion that the defendant no.1 was given in adoption to Govardhandas Shmasukh on 8-7-1973 and necessary adoption ceremony had taken place. He also held that original plaintiff Sundarabai was a partner in the partnership firm i.e. defendant no.5 and the firm stands dissolved from 1-10-1984 onwards and therefore passed preliminary decree for accounts.

10. Being aggrieved by the said order and mainly the finding recorded by the trial Court that Ratanlal is adopted son of Govardhandas the heirs of original plaintiff Sundarabai filed the present appeal. In this appeal before us Shri Mohan Pungalia, learned Advocate for the plaintiffs has urged only 2 points. Firstly, he submitted that the learned trial Judge ought to have framed the issue as to whether the defendant no.1 has proved that he is adopted son of Govardhandas instead, the learned trial Judge framed the issue in the negative form. The learned trial Judge framed the issue "whether the plaintiffs prove that Ratanlal is not adopted son of deceased Govardhandas. According to the learned Advocate for the plaintiffs burden was on defendant no.1 to prove that he is adopted son of Govardhandas. Secondly, the learned Advocate for the plaintiffs canvassed before us that the learned trial Judge has not at all properly appreciated the evidence on record and has failed to take into consideration the material circumstances and reached to a wrong conclusion that Ratanlal is adopted son of deceased Govardhandas. He therefore submitted that appeal be allowed and it be declared that Ratanlal i.e. defendant no.1 is not adopted son of deceased Govardhandas.

11. As against this Mrs.Anita Agarwal, learned Advocate for the defendants supported the judgment and order passed by the learned trial Judge and submitted that

there is sufficient oral evidence coupled with photographs of the adoption ceremony to prove that the defendant no.1 was adopted by Govardhandas. She therefore, submitted that appeal be dismissed.

12. It is not in dispute that Govardhandas and Chunilal were the real brothers. It is also an admitted fact that Chunilal had 3 sons while Govardhandas had no son and only 4 daughters. It is also not in dispute that Chunilal predeceased Govardhandas. Admittedly, Chunilal was not residing at Nasik and as a result of the same the defendant no.1 since its childhood had gone to Nasik for education and was residing with his uncle Govardhandas. Not only that but subsequently he was also taken as a partner in the business of Govardhandas. He was treating him like a son.

13. The main and material question is whether Ratanlal the defendant no.1 was taken in adoption by Govardhandas on 8-7-1973 as contended by the defendants and their wittiness. Firstly, it has to be mentioned that even according to the defendant no.1 on 8-7-1973 he was of 32 years of age and married. Not only that but he had children also. So, first we have to see whether the alleged adoption is valid and legal. For that purpose it would be worthwhile to see what Sections 6 and 10 of the Hindu Adoption and Maintenance Act 1956 (hereinafter called the said Act) say. It read as under :

Sec.6 : Requisites of a valid adoption - No adoption shall be valid unless:

i) the person adopting has the capacity, and also the right, to take in adoption;

ii) the persons giving in adoption has the capacity to do so;

iii) the person adopted is capable of being taken in adoption; and

iv) the adoption is made in compliance with the other conditions mentioned in this chapter.

Sec.10: Persons who may be adopted - No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely;

i) he or she is a Hindu;

ii) he or she has not already been adopted;

iii) he or she has not been married, unless there is a custom or usage applicable to the

parties which permits persons who are married being taken in adoption;

iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.

14. From the bare reading of the above mentioned provisions as well as the admitted facts, prima facie it does appear that on 8-7-1973 the defendant no.1 Ratanlal was not capable of being taken in adoption. Even then it is the specific contention of the defendant no.1 that he was taken in adoption by Gowardhandas and it is legal. It is needless to say that under such circumstances the burden lies on the defendants to prove the alleged adoption. The plaintiffs witness Dhansukhlal has stated that defendant no.1 was not taken in adoption. A negative fact cannot be proved by tangible evidence. Once plaintiff's witness has stated specifically that defendant no.1 was not taken in adoption and original plaintiff had also specifically averred in the plaint that defendant no.1 was not taken in adoption and earlier stated accordingly in the notice reply given by her, then certainly burden is on the defendant no.1 to prove that he was taken in adoption. However, firstly, it must be noted that even in his written statement the defendant

no.1 has not at all specifically pleaded that he was taken in adoption on 8-7-1973. In fact there is no positive assertion of the said fact in the written statement. All that he has said in the written statement is that case of the plaintiff that the defendant no.1 was not taken in adoption is not true and correct. So, in the background of such pleadings of the defendant no.1, which are certainly vague and evasive we have to scan the evidence on record and find out whether it is proved that the defendant no.1 was given in adoption to Gowardhandas. It is an admitted fact that there is no document of adoption leave aside the registered document. So, the oral and documentary evidence shall have to be scrutinised with great care and caution. In fact in order to show as to what should be the approach of the Court the learned Advocate for the plaintiffs has placed reliance on a case **Rahasa Pandiani (dead) By Lrs and others V/s Gokulananda Panda and Ors. (1987) 2 SCC 338** wherein Their Lordships have observed :

"When the plaintiff relies on oral evidence in support of the claim that he was adopted by the adoptive father in accordance with the Hindu rites and it is not supported by any registered document to establish that such an adoption had really and as a matter of fact taken place, the court has to act with a great deal of caution and

circumspection. Be it realized that setting up a spurious Will, and equally, if not more difficult to unmask. And the court has to be extremely alert and vigilant to guard against being ensnared by schemers who indulge in unscrupulous practices out of their lust for property. If there are any suspicious circumstances, just as the propounder of the will is obliged to dispel the cloud of suspicion, the burden is on one who claims to have been adopted to dispel the same beyond reasonable doubt. In the case of an adoption which is not supported by a registered document or any other evidence of a clinching nature if there exist suspicious circumstances, the same must be explained to the satisfaction of the conscience of the court by the party contending that there was such an adoption. Such is the position as an adoption would divert the normal and natural course of succession. Experience of life shows that just as there have been spurious claims about execution of a Will, there have been spurious claims about adoption having taken place. And the court has therefore to be aware of the risk involved in upholding the claim of adoption if there are circumstances

which arouse the suspicion of the court and the conscience of the court is not satisfied that the evidence preferred to support such an adoption is beyond reproach".

In fact similar view was taken by the Apex Court in **Kishori Lal V/s Chalitibai AIR 1959 SC 504** wherein also Their Lordships had observed :

"As an adoption results in changing the course of succession, depriving wives and daughters of their rights and transferring properties to comparative strangers or more remote relations it is necessary that the evidence to support it should be such that it is free from all suspicion of fraud and to consistent and probable as to leave no occasion for doubting its truth. Failure to produce accounts, in circumstances such as have been proved in the present case, would be a very suspicious circumstance".

15. Bearing in mind the above observations and caution we have to scrutinise the evidence on record. Firstly, it must be noted that as at the time of adoption defendant no.1 was married and 32 years, it was absolutely essential for him to aver and prove that as per their custom i.e. custom in Jain community, a

married person above the age of 18 years can be adopted. Unfortunately, we find that such custom is in fact not pleaded by the defendants in written statement. So, there is in fact no question of proving the same. No amount of evidence can be looked into in the absence of pleading. However, even if we assume that defendant no.1 is entitled to adduce evidence with regard to custom then also we find that the evidence adduced by him is certainly not sufficient to jump to the conclusion that he has proved the alleged custom. For this purpose useful reference can be made to Sec. 3 of the said Act which says what Custom means.

"3. Definitions - In this Act, unless the context otherwise requires - (a) The expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus, in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that, in the case of a rule applicable only to a family, it has not been

discontinued by the family";

16. In the instant case, the defendant no.1 has only vaguely stated that in their community married person can be given in adoption and there is no bar in respect of age of the son to be adopted. Merely because he and his witnesses have stated accordingly that by itself is not sufficient to jump to the conclusion that their evidence is sufficient to prove the alleged custom. In fact neither the defendant nor his witnesses have given details about the instances of the adoption where a - grown up married person was given in adoption. As per Section 3 of the said Act the parties must show that particular practice was openly, continuously and uniformly observed for a long time and the said practice was not uncertain unreasonable or opposed to any public policy. When such things is proved then only it can be said that particular practice and act or conduct has acquired the status of "custom" or "usages". So, if we consider the evidence adduced by defendant no.1 by applying above tests, then it must be said that the same is not sufficient to prove the alleged custom. However, fortunately for defendant no.1 this lacuna in adducing the evidence with regard to custom will not lead us to hold that there is no custom in the Jain community to give married and grown up person in adoption in view of the reported ruling of this Court to which our attention is drawn by Mrs Anita Agarwal, learned Advocate for the

defendants. She submitted that there is a custom in Jain community even to give married grown up person in adoption and it is judicially recognised and as such now objection cannot be raised that as defendant no.1 was married and 32 years of age when the alleged adoption took place the same is not valid. In support of her proposition, she has placed reliance on a case **Laxmi P. Rathi Vs State of Maharashtra 1983 Mh.L.J. 811** wherein the learned single Judge of this Court has observed that custom of adoption of a married person or of a person of any age has been accepted in the Marwari Community or Maheshwari Community as it is called. The said custom having been judicially recognised, independent proof of such custom is not necessary. Even it is well settled position that in the Bombay State a person of any age may be adopted. Even in a case **Kondiba Rama Papal @ Shirke V/s Narayan Kondiba Papal (1991) SCC 218** it has been held that custom is judicially recognised in the Bombay State as regards adoption of a child of any stage. Once the custom is judicially recognised it is not required to be independently proved in subsequent case. Taking into consideration this position of law, in the instant case it has to be held that the defendant no.1 was capable of giving in adoption.

17. It is needless to say that it is not enough for the defendant no.1 only to show that he was capable of giving in adoption. Ultimately, factum of adoption has to be

proved by the defendant no.1. According to him the adoption ceremony took place on 8-7-1973 i.e. one day prior to the marriage of Gowardhandas's daughter Asha. The defendant no.1 has stated in his deposition Exh.121 that on that day several persons were invited for the adoption ceremony and for that purpose even Invitation cards were distributed. Priest by name Chaturbuji Sharma (PW 2) was present. He chanted Mantras and then defendant no.1 was asked to take seat a lap of Gowardhandas and then priest declared that defendant no.1 Ratanlal is given in adoption to Gowardhandas and from that day he was named as Ratanlal Gowardhandas Shamsukh instead of Ratanlal Chunilal Shamsukh. In order to prove this version, the defendant no.12 has placed on record photographs at Exh.158 to 164 alleged to have been taken at the time of adoption ceremony. We have carefully gone through the said photographs. However, it must be noted that there is not even a single photograph which would clearly show the presence of defendant no.1 his natural mother, his adoptive father and mother and priest. There is also not a single photograph which would go to show that above mentioned 4 persons were actually carrying out religious ceremonies with regard to adoption. There is no photograph to show that defendant no.1 took a seat in lap of adoptive father Gowardhandas. So, these photographs by themselves are certainly not sufficient to come to the conclusion that the adoption ceremony as alleged by the defendant no.1 has taken place. What is

more to be noted is that negatives of the above mentioned photographs have not been produced by the defendant no.1. Defendant's witness Ajit Sarang has only said that on the date of adoption he had accompanied his father and his father had taken the said photographs. There is no satisfactory reason given by the said witness for not producing the negatives. There is also nothing on record to indicate that the charges of the said photographs were paid by the defendant no.1 or by his adoptive father. So, we are not inclined to attach any importance to the said photographs and evidence of witness Ajit Sarang Exh.155.

18. The defendant's witness Chaturbhuj Sharma Exh.152 has stated that he acted as a priest at the time of alleged adoption ceremony. It is pertinent to note that there is no sufficient evidence to show that Chaturbhuj Sharma is in fact recognised as a priest and is doing work as a priest in such type of ceremonies. From his evidence as well as from the evidence of defendant no.1 it is very clear that on 9-7-1973 there was marriage ceremony of Gowardhandas' daughter Asha and on previous day there were some religious functions in respect of Asha's marriage and for that also this witness was called as a priest. So, merely from the said photographs one would not be in a position to jump to the conclusion that the said photographs are in respect of adoption ceremony. Incidentally, it must be noted that evidence of this

witness and other witness so also of defendant no.1 is contradictory, the defendant no.1 Ratanlal has stated that at the time of adoption ceremony he took a seat in the lap of Gowardhandas while on the contrary the priest has said that considering the fact that Gowardhandas was of old age and weak and defendant no.1 Ratanlal was more healthy, Ratanlal was not asked to take a seat in a lap of Gowardhandas. So, the evidence of defendant no.1 and priest is contradictory on this point. Naturally, it creates some doubt as to whether the actual ceremony of adoption has in fact taken place or not.

19. Apart from the direct evidence with regard to adoption ceremony there can be evidence in the form of conduct of the parties as well as certain other circumstances which would go to show whether adoption has taken place or not. In the instant case, the defendant no.1 has stated that after adoption he was identified as Ratanlal Gowardhandas and accordingly he had in fact received some letters from his friends and relatives. He has produced at Exh.122 letters sent by Parasmal Kothari. It is dated 25-5-1983. From this letter which is post card it does appear that it is addressed to Ratanlal Gowardhandas Shamsukh, Ravivar Peth, Nasik. There is another letter written by one Champavat Lunavat from Yavatmal to defendant no.1 on 22-8-1981. However, merely from these two letters one cannot jump to the conclusion that defendant no.1 was naming himself as Ratanlal

Gowardhandas Shamsukh after alleged adoption dated 8-7-1973. The second letter is in fact addressed as Gowardhandas Ratanlal Shamsukh. So, the address appears to be incorrect. The third letter which is at Exh.125 alleged to have been written on 10-12-1983 is written on the letter head of C.H.Sungadhi. The postal envelope is not produced. So no weightage can be given to the said letter. Besides this, as since childhood defendant was residing with Gowardhandas and he was treating defendant no.1 as his son, some one may be carrying wrong impression that defendant is the son of Gowardhandas. So, the above mentioned letters in the facts and circumstances of the case are certainly not sufficient to hold that defendant was given in adoption to Gowardhandas. What is more to be noted is that the defendant no.1 himself has clearly admitted that subsequent to 8-7-1973 also he was naming himself as Ratanlal C. Shamsukh. Not only that but it is pertinent to note that even in the present suit though he was shown as Ratanlal C. Shamsukh he did not take any objection. On the contrary he filed the written statement also in the same name and signed it as Ratanlal C. Shamsukh. If we accept that adoption had taken place with a view that after the death of Gowardhandas his name should be continued by his sons and even as per priest on the date of adoption the name of defendant no.1 was changed then certainly the defendant no.1 would not have continued to represent himself by his earlier name but on the contrary

he would have represented himself everywhere as Ratanlal Gowardhandas Shamsukh. It is really interesting to note that even after 8-7-1973 when defendant filed one suit, at that time also he disclosed himself as Ratanlal Chunilal. Not only that but in cross examination he has clearly stated: "It is true that I have never shown my name as Ratanlal Gowardhandas"

He has further stated :

"I have not produced any document to show that I was using my name as Ratanlal Gowardhandas after 1973".

Not only that but he has further stated in the cross examination :

"I have never filed application to claim succession of Gowardhandas. ... "At the time of purchase of property in 1975 I have shown my name as Ratanlal Chunilal".

20. Thus, we find that right from alleged adoption till filing of the present suit and even thereafter the defendant no.1 never adopted the name of his adopted father but all along continued with his earlier name and did not even claim any succession of Gowardhandas after the death of Gowardhandas. What is more to be noted here that defendant no.1 has not at all given any explanation

as to why he did not adopt the name of adoptive father once according to him he was given in adoption. So, the conduct of the defendant no.1 clearly indicates that his contention that he was adopted by Gowardhandas is false. On the contrary, we find that since long Sundarabai had taken a stand that defendant no.1 was not adopted by her or by her husband. So, this conduct of the plaintiff no.1 speaks volume and shows that there is no sustenance in the contention of the defendant no.1.

21 It is pertinent to note that even after 1973 all along the defendant no.1 filed his Income Tax Return in the name of Ratanlal Chunilal. Not only that but he also admits that even in the partnership business he continued his name as Ratanlal Chunilal. We cannot ignore the fact that parties to this proceedings are Jains and they are doing business. So, if really, adoption as contended by the defendant no.1 had actually taken place and acted upon then certainly the effect of the same would have been reflected even in the partnership accounts and other documents. The defendant no.1 would not have purchased the property in his earlier name but would have certainly acquired it in his new name. Thus, we find that the conduct of the defendant no.1 and numerous circumstances mentioned above create a grave suspicion about the contention of the defendant no.1. In **Rahasa Pandiani (dead) by Lrs and Ors. V/s Gokulananda Panda and Ors. (1987) 2 Supreme Court Cases 338** Their Lordships of the

Supreme Court have observed that in the case of an adoption which is claimed on the basis of oral evidence and is not supported by a registered document or any other evidence of a clinching nature, if there exist suspicious circumstances, the same must be explained to the satisfaction of the conscience of the court by the party contending that there was such an adoption. In the present case, the defendant no.1 has not at all even made an attempt to explain the above mentioned suspicious conduct and circumstances and as such in our considered view the learned trial Judge has failed to attach due importance to a host of significant circumstances which clearly indicate that version regarding adoption does not inspire confidence. We are, therefore of the opinion that finding recorded by the learned trial Judge on issue no.8 is not legal and correct and the same is also not borne out from the evidence on record and as such the same has to be set aside and it must be held that defendant no.1 Ratanlal is not the adopted son of late Gowardhandas and original plaintiff Sundarabai.

22. The learned Advocate for the Appellant original plaintiff has not challenged the other finding of the learned trial judge regarding dissolution of partnership and accounts etc. Hence the appeal is partly allowed. The finding of the trial Court that defendant no.1 Ratanlal is adopted son of late Gowardandas is set aside and it is hereby declared that defendant no.1 Ratanlal is

not the adopted son of Gowardhandas Lakhmichand Shamsukh. Consequently, the defendant no.1 is hereby permanently restrained from representing himself as son of Gowardhandas and naming himself as Ratanlal Gowardhandas Shamsukh.

23. The order passed by the learned trial Judge regarding dissolution of the firm and taking accounts is confirmed.

24. Considering the peculiar facts of the case parties to bear their own costs of this appeal.

(S.R.SATHE, J.)

(S.B.MHASE, J.)